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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	
Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit	
Bell Atlantic (North) Telephone Companies' Continuing Property Records Audit	
Bell Atlantic (South) Telephone Companies' Continuing Property Records Audit	CC Docket No. 99-117
BellSouth Telecommunications' Continuing Property Records Audit	ASD File No. 99-22
Pacific Bell and Nevada Bell Telephone Companies' Continuing Property Records Audit	FOIA Request Control No. 99-163
Southwestern Bell Telephone Company's Continuing Property Records Audit	
U S WEST Telephone Companies' Continuing Property Records Audit	

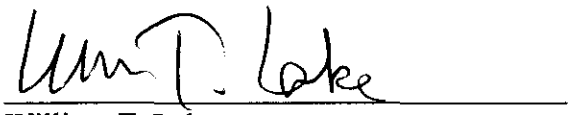
To: The Commission

MOTION BY U S WEST FOR LEAVE TO FILE REPLY TO MCI'S OPPOSITION

To the extent not already authorized by 47 C.F.R. § 1.115(d), U S WEST Communications Inc. ("U S WEST") respectfully seeks leave to file the attached reply to MCI WorldCom's Opposition to Applications for Review in the above-captioned proceeding.

In support of this motion, U S WEST notes that Section 1.115(d) expressly provides for the filing of replies to oppositions to applications for review. Section 0.461 of the Commission's rules, 47 C.F.R. § 0.461, does not expressly bar the filing of a reply in FOIA matters. Moreover, the present case involves novel issues arising from an unprecedented decision to disclose audit records. The public interest would be served by a full airing of the issues, particularly regarding the legal questions raised in MCI's Opposition concerning the source of the Commission's authority to disclose information otherwise protected by the Trade Secrets Act, and the propriety of the use of protective orders in dealing with Freedom of Information Act requests.

Respectfully submitted,



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August 27, 1999

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To: The Commission

REPLY OF U S WEST TO MCI'S OPPOSITION

U S WEST Communications Inc. respectfully submits this reply to the new issues raised in MCI WorldCom's Opposition to Applications for Review.

I. FEDERAL LAW DOES NOT AUTHORIZE THE AGENCY TO DISCLOSE INFORMATION OTHERWISE PROTECTED BY THE TRADE SECRETS ACT.

MCI does not argue that the information at issue in this case is not protected under Exemption 4. Instead, it relies on *FCC v. Schreiber,* 381 U.S. 279 (1965), to support its argument that the Bureau is authorized under Section 4(j) of the Communications Act to disclose confidential information despite the strictures of the Trade Secrets Act. But *Schreiber* has nothing to say about this case: it was issued before passage of the FOIA, and does not even mention the Trade Secrets Act. These are the statutes that govern the release of confidential information during the course of an audit.

Schreiber simply upheld a Commission rule that required disclosure absent a justification for nondisclosure, and a decision to disclose information based on the agency's rejection of a "naked assertion of possible competitive injury." *Id.* at 298-99. Here, in contrast, the rule at issue in *Schreiber* has been superseded by the Commission's rules implementing specific FOIA exemptions, and the Bureau concedes that "we cannot presumptively conclude that none of the requested materials fall under the ambit of Exemption 4." *Bureau Letter* at 3.

To the extent that *Schreiber* comments more generally on the power of federal agencies to determine whether to disclose information about trade secrets, it has been superseded by *Chrysler Corp. v. Brown,* 441 U.S. 281 (1979). *See id.* at 316 (distinguishing *Schreiber* on the ground that "[t]here was no question in [that] case regarding the applicability of § 1905."). In *Chrysler,* the Supreme Court directly addressed the intersection of Exemption 4 of the FOIA and the Trade Secrets Act. Under the Trade Secrets Act, agencies are prohibited from disclosing information described by the Act unless they are "authorized by law" to do so. 18 U.S.C. §

1905. The Court in *Chrysler* held that the rules underlying an agency's decision to disclose such information pursuant to a FOIA request are "authorized by law" only if "(1) rooted in a grant of power by Congress to limit the scope of the Trade Secrets Act; (2) substantive, rather than interpretive or procedural; and (3) consistent with any procedural requirements imposed by Congress." *Bartholdi Cable Co. V. FCC,* 114 F.3d 274, 281 (D.C. Cir. 1997) (citing *Chrysler*) (internal quotations omitted); *see also Chrysler,* 441 U.S. at 301-06.

MCI does not even mention *Chrysler,* much less show how its criteria are satisfied here. It offers no evidence that, in passing either Section 4(j) or Section 220(f), Congress intended any impact on the protections afforded by the Trade Secrets Act. The statutes themselves show the opposite. Section 4(j) is a general "housekeeping statute," *see Chrysler,* 441 U.S. at 309; its only discussion of disclosure authorizes the Commission, in the context of matters affecting the national defense, to *withhold* information. Section 220(f) guards *against* disclosure by ensuring that individual Commission employees not disclose sensitive information. It is clear that when it enacted these statutes, Congress did not intend to broaden instances of "public disclosure of trade secrets or confidential business information." 441 U.S. at 306. Accordingly, as in *Chrysler,* "it is simply not possible to find in these statutes a delegation of the disclosure authority asserted by [MCI] here." *Id.*

Even if the Commission were authorized under Section 4(j) or Section 220(f) to issue regulations limiting the protections of the Trade Secrets Act, the Bureau would have to actually apply the regulations in deciding whether to disclose information covered by the Act. It failed to do so here. Although it cited Section 0.461 of the Commission's rules in its decision letter, *see Letter* at 5, the Bureau did not perform the analysis required by that rule. Under

Section 0.461(f)(4), the Bureau must weigh "the considerations favoring disclosure and nondisclosure . . . in light of the facts presented." 47 C.F.R. § 0.461(f)(4). For instance, the Bureau did not consider the impact that disclosure would likely have on future audits -- a factor that features prominently in federal courts' and the Commission's analysis of FOIA disclosure. *See, e.g., Critical Mass Energy Project v. NRC,* 975 F.2d 871, 879 (D.C. Cir. 1992) ("It is a matter of common sense that the disclosure of information that the Government has secured from voluntary sources on a confidential basis will . . . jeopardize its continuing ability to secure such data on a cooperative basis . . ."); *Confidential Information,* Notice of Inquiry and Notice of Proposed Rulemaking, 11 F.C.C.R. 12406 at ¶ 51 (1996) ("public disclosure of data gathered in an audit is likely to impair [the Commission's] future ability to obtain such data."). Indeed, *Chrysler* clearly contemplates that agencies will promulgate *and apply* regulations governing disclosure. Similarly, the Trade Secrets Act requires agencies to do so. Thus, even assuming that Section 4(j) or Section 220(f) authorized the agency to disclose confidential information under rule 0.461 (which neither does), the Bureau was required first to perform the analysis set out in the rule.

II. CONDITIONING DISCLOSURE ON THE ISSUANCE OF A PROTECTIVE ORDER DOES NOT CURE THE UNLAWFULNESS OF THE DISCLOSURE.

MCI suggests that, to the extent that the disclosures it requests are unlawful, they can be saved by an accompanying protective order. MCI Opp. at 6-7. But FOIA does not contemplate disclosure limited by a protective order to a particular recipient; "[t]he Act's sole concern is with what must be made public or not made public." *Department of Justice v. Reporters Comm. For Freedom of the Press,* 489 U.S. 749, 772 (1989). MCI's argument thus

"misapprehends the FOIA's basic principle of *public access* to government documents. The identity of an individual requesting documents under the FOIA, or the reasons for an individual's request, are simply not relevant to the merits of a FOIA request." *Solar Sources, Inc. v. U.S.*, 142 F.3d 1033, 1039 n.6 (7th Cir. 1998) (emphasis added). Issuance of a protective order in this case, therefore, presents no solution to the unlawfulness of the underlying disclosure. *See id.* (rejecting suggestion that issuance of protective order would render otherwise properly undisclosed documents disclosable).

III. IN ANY EVENT, MCI FAILS TO SHOW THAT DISCLOSURE OF THE INFORMATION IS NECESSARY FOR ITS RESPONSE TO ISSUE 2.

MCI argues that it must obtain the requested information in order to comment on Issue 2 of the Notice of Inquiry. Issue 2 requests comment on "[t]he validity and reasonableness of the methodology used by the Bureau's auditors in determining whether to rescore or to modify a finding during a field audit that equipment was 'not found.'" *Ameritech Corp. Tel. Operating Cos.' Continuing Property Records Audit,* Notice of Inquiry, FCC 99-69, CC Docket No. 99-117, 1999 WL 190421, at 3 (rel. April 7, 1999) ("NOI"). In a rather remarkable sentence, MCI argues that, in order to comment on the reasonableness of the auditors' methodology, it must comment both on the reasonableness of the methodology *and, in addition,* "whether the auditors *applied* the stated methodology in a reasonable and consistent manner." MCI Opp. at 5. But Issue 2 does not seek comment on the *application* of the methodology -- it asks only about the validity of the methodology itself. And the methodology is fully explained in the Public Notice that accompanies the NOI. *See Accounting Safeguards Division Releases Information,* 14 F.C.C.R. 6243 (rel. April 7, 1999). MCI has failed to demonstrate, for example, why it needs to

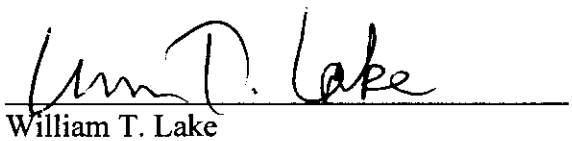
know what equipment was retired in order to evaluate whether the method for rescoring retired equipment was appropriate. Moreover, confidential information that RBOCs submitted on "not found" items can be of little, if any, use in evaluating the validity of a methodology announced more than six months after those submissions were made. MCI needs no confidential information in order to comment on Issue 2.

Ultimately, MCI's argument reduces to a plea that obtaining these FOIA-exempt materials will enable it "to assist the Commission's analysis," if only by helping "to inform any Commission decisions concerning enforcement activities." MCI Opp. at 6. The notion that third parties should obtain FOIA-exempt materials protected by the Trade Secrets Act in order simply to act as private attorneys general in Commission audits or enforcement actions is flatly inconsistent with the Commission's careful limits on third-party intervention in such proceedings. *See, e.g., John M. Roberts,* 3 F.C.C.R. 371 (1988) (rejecting third party's request for access to information obtained pursuant to an investigation). Removing these limits would have severe consequences for the Commission's ability to conduct its investigations promptly and efficiently, as the Commission's audit confidentiality policy has long recognized. *See* U S WEST Application at 10-11 (citing *Confidentiality R&O,* at ¶ 54).

CONCLUSION

For the foregoing reasons and for the reasons stated in U S WEST's Application for Review, the Commission should vacate the Bureau Decision and order that the confidential information not be released, pursuant to a protective order or otherwise.

Respectfully submitted,



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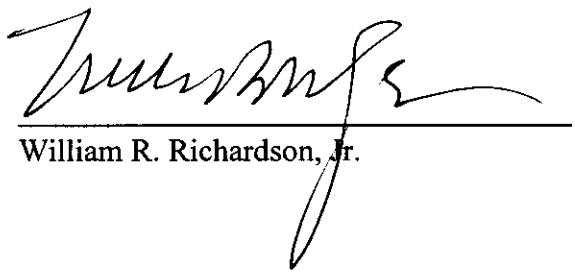
August 27, 1999

CERTIFICATE OF SERVICE

I, William R. Richardson, Jr., do hereby certify that on this 27th day of August, 1999, I have caused the foregoing Motion by U S WEST for Leave to File Reply to MCI's Opposition to be served via hand delivery or third party commercial carrier upon the persons listed on the attached service list.



William R. Richardson, Jr.

* Served via third party commercial carrier

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